

REMARKS

The specification and claims have been carefully reviewed in the light of the Office Action (Final) with a notification date of September 23, 2010.

Claim 1 has been amended to specify that the insoluble citrus fruit fiber is applied in a concentration from about 0.5 to about 9.0%, based on the total weight of the edible emulsion. Support for this subject matter may be found at page 3, lines 24-27 and page 5, lines 6-9 of the Specification. Additional support may be found in claim 4, which has been canceled, without prejudice.

Care has been taken not to introduce any new matter.

The Present Invention

The process of the present invention is directed to making oil-in-water emulsions of the mayonnaise type, containing insoluble citrus fibers and a dairy base selected from the group consisting of yoghurt, crème fraîche, sour cream, cream, and mixtures, which products contain acidulant for various purposes such as ambient shelf stability.

Double patenting and 103(a) Over 7,510,737 and 10/576,704

In addition to nonstatutory obviousness-type double patenting, claims 1, 2, 4 and 7 were rejected under 35 USC 103(a) as being unpatentable over Bialek (US 7,510,737). Bialek is one of the two applications of which **the present application claims the priority date of October 24, 2003** (as well as EP04077323.6 filed August 17, 2004). Hence, Bialek cannot be cited as prior art against the present application. 35 USC 103(c) does not work either, because the present application has an effective priority date of October 24, 2003.

Co-pending application **10/576,704** is also not prior art for purposes of 35 USC 102 or 103 because it has a filing date of **May 17, 2007**, whereas **the present application has an effective filing date of October 23, 2003** by way of claiming priority from a US application filed on that date that resulted in US 7,510,737, (as well as from EP04077323.6 filed August 17, 2004).

Co-pending application **10/576,704** does not qualify as prior art under any section of 102 and certainly **not 102(e)** as it was published in 2008, whereas **the present application has an effective filing date of October 23, 2003** (and an actual US filing date in 2007).

As to the assertion that the invention is obvious, Bialek, et al., U.S. Patent No 7,510,737 and Co-pending application **10/576,704** (Unilever) are not proper 103(a) references because, as provided in 35 U.S.C. 103(c), the subject matter of the present invention was commonly owned, or subject to an obligation of assignment to the same person, at the time the invention was made.

The American Inventor's Protection Act of 1999 (AIPA) amended 35 U.S.C. 103(c) to add that subject matter that only qualifies as prior art under 35 U.S.C. 102(e)

and that is commonly owned, or subject to an obligation of assignment to the same person, at the time the invention was made cannot be applied in a rejection under 35 U.S.C. 103(a). A statement (by itself) by the applicants attorney of record to the effect that the application and the reference were, at the time the invention was made, owned by, or subject to a common obligation of assignment to, the same person is sufficient evidence for the exclusion of commonly owned or assigned prior art under 35 U.S.C. 103(c) to apply. See OG Notice, 1241 OG 96 (Dec. 26, 2000). *In accordance with 35 U.S.C. § 103(c), it is hereby stated that the Bodor '394 103 based on 102(e)) shall not preclude patentability under this section because the subject matter and the claimed invention were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person (Unilever).* There is a common inventor and the subject matter of the present invention was commonly owned, or subject to an obligation of assignment to the same person, at the time the invention was made.

Reconsideration and withdrawal of the 103 rejection over Bialek, et al., U.S. Patent No 7,510,737 and Co-pending application **10/576,704** (Unilever) is respectfully requested.

Applicants have included a Terminal Disclaimer for Bialek (US 7,510,737) and for co-pending 10/576,704. Applicants' representative hereby states that the subject matter of the present patent application is subject to an obligation of assignment to the same person (Unilever) as Bialek (US 7,510,737) and for co-pending 10/576,704. The Terminal Disclaimer and the statement hereby overcome the non-statutory obviousness-type double patenting rejection and the 103(a) rejection.

Obviousness

The present invention provides a method for making an edible emulsion of the mayonnaise type comprising insoluble citrus fibers that can advantageously be used to prepare a reduced fat food product that has the texture and sensorial properties associated with a full fat product, while additionally having the health benefits associated with food products containing fiber (see pg. 2, lines 1-7).

In the present method a coarse emulsion comprising oil, water, dairy base selected from the group consisting of yoghurt, crème fraîche, sour cream, cream and mixtures thereof, and insoluble fruit fiber is homogenized in a homogenizer and the homogenizer is pressurized from 35.0 to 650.0 bar and at a temperature from 15 °C to 70 °C whereby the homogenization is carried out in two or more separate homogenization steps, resulting in an edible emulsion with a smooth texture. Unexpectedly, the edible emulsion prepared using the claimed method enables the preparation of food products that maintain viscosities that are consistent with those of full fat products, even when < 1.0% by weight of the food product thickening gums and/or stabilizers are employed (see page 10, lines 1-4).

Claims 1, 2, 4, 8 and 10-11 were further rejected under 35 USC 103(a) as being unpatentable over Vom Dorp (EP 0949295) as further evidenced by Francis and in view of Fischer. Applicants respectfully traverse.

Vom Dorp discloses a process for preparing yoghurt, comprising blending pasteurized milk, sucrose, gelatin replacer, modified starch, skimmed milk, preheating to 50-52°C and homogenization at 175-200 bar, wherein said gelatine replacer comprises wheat fibers and modified starch.

The examiner asserts that the claims of the present invention differ from Vom Dorp in recitation of the use of two homogenization steps, but that homogenization of milk products is typically carried out in a two-stage process, whereby Francis is cited to support this assumption. The examiner then goes on to argue that Vom Dorp teaches the addition of fruit preparation.

Fischer discloses at page 29:

typical applications fields in the food industry include products where viscosity enhancement or thickening can be accepted as a side-effect of dietary fibre fortification.

According to the examiner, it would have been obvious to substitute the fruit fiber of Fischer for the wheat fiber of Vom Dorp and come up with the claimed invention.

Applicants respectfully traverse.

Vom Dorp would only suggest a combination of wheat fiber gel and modified starch. Vom Dorp discloses a process for preparing yoghurt, comprising blending pasteurized milk, sucrose, gelatin replacer, modified starch, skimmed milk, preheating to 50-52°C and homogenization at 175-200 bar, wherein said gelatine replacer comprises wheat fibers and modified starch. After homogenization, the homogenized mixture is incubated with culture, followed by addition of fruit prep and aseptic filling.

The method defined in present claim 1 differs from the method disclosed in Vom Dorp in that it comprises the following features:

- a) the use of insoluble citrus fruit fiber in a concentration of 0.5-9% by weight of the emulsion to produce a coarse emulsion;
- b) homogenization of the coarse emulsion to produce a smooth emulsion not having a grainy texture.
- c) two or more homogenization steps (35-650 bar and 15-70°C)

Vom Dorp is concerned with replacing gelatine in dairy products, fermented milk products, fat spreads and margarine (paragraph [0001]). Vom Dorp further teaches (paragraph [0014]) a method for preparing a gelatine replacer comprising the steps of

- mixing wheat fiber gel with starch;
- thoroughly homogenizing the product at a temperature below 50°C, and optionally
- drying the product.

The Examples of vom Dorp describe the preparation of a yogurt and a low fat spread comprising the aforementioned gelatine replacer.

The Office Action maintains that homogenization of milk products is typically carried out in a two-stage process and that it would have been obvious to apply such a two-step homogenization in the process described in vom Dorp.

None of the cited references teaches a process in which first a coarse emulsion is produced and in which subsequently said emulsion is homogenized to produce a smooth emulsion. Hence, the subject matter of amended claim 1 cannot be obvious over the cited references.

in particular, one of ordinary skill in the art would not learn from Francis to carry out homogenization from 35.0 to 650.0 bar and at a temperature from 15 °C to 70 °C in two or more separate homogenization steps to obtain food products that maintain viscosities that are consistent with those of full fat products. If anything, Francis is solely concerned with general aspects of homogenization and merely suggests that some products (not specified) "might require more than one pass through the homogenizer or the use of a two-stage homogenizing valve".

Fischer does not disclose or suggest how to make an emulsified product as currently claimed. However, the Office Action maintains that vom Dorp teaches the addition of fruit preparation, while Fischer teaches that insoluble fruit fiber may be used as a thickening agent in food products.

Perhaps it could be argued that a person of ordinary skill in the art might have been motivated by Fischer to substitute wheat fiber in the manufacturing process according to vom Dorp with insoluble fruit fiber. However, such argumentation would only be valid if Fischer teaches that the insoluble fruit fiber delivers a functionality that is similar to the functionality that according to vom Dorp is provided by the wheat fiber.

In paragraph [0004] of vom Dorp the following observations are made with respect to wheat fiber:

- *Wheat fiber gel is made by thermal/physical processing of wheat fiber. A special milling technique is used for treating wheat material resulting in a product containing a large proportion of microfine particles. Specific improvements are obtained by mixing the product*

with maltodextrin. The product so obtained is sold under the tradename Vitacel. This product is a dry powder, which readily disperses in water. Upon stirring of the dispersion the gel forms through shear forces. It is reported that wheat fiber gel can be used as a gelatin replacer in yoghurt or ice cream. (H. Bollinger, Food Marketing & Techn. Oct. 1995, 4-6)

Thus, vom Dorp teaches that a combination of a wheat fiber and maltodextrin can be used to produce aqueous gels and this combination can be applied as gelatine replacer.

In contrast, Fischer nowhere mentions or suggests that insoluble fruit fibres can be used to produce aqueous gels, let alone that these could be used to replace gelatine. Consequently, a person of ordinary skill in the art would not have been motivated by Fischer to replace wheat fiber in the process of vom Dorp by insoluble fruit fiber.

Hence, for the reasons presented above, the subject matter of present claim 1 has inventive merit vis-à-vis the cited references.

The subject matter of the dependent claims is also deemed to have inventive merit vis-à-vis the cited references for the reasons already presented above.

CONCLUSION

Reconsideration of the rejections is respectfully requested in view of the above claim amendments and remarks.

It is respectfully requested that the application be allowed to issue.

If a further telephone conversation would be of assistance, Applicant's undersigned attorney invites the Examiner to telephone at the number provided.

Respectfully submitted,

/Ellen Plotkin/

Ellen Plotkin
Attorney for Applicant(s)
Reg. No. 36,636

(201) 894-2253